United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1056
26 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1056

Case No. 1152: KATZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas at the request of Stephen Katz, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 August 2000, the Applicant filed an Application requesting the Tribunal:

"...

A. ...[T]o rule that the due process rights of the Applicant were violated in the proceedings before the Joint Appeals Board (JAB), as a result of:

(a) [T]he failure of the JAB to obtain the full written [record] of the promotion proceedings before the Appointment and Promotion Board (APB),

...

(d) [T]he failure of the JAB and the Respondent to provide to the Applicant the full written record of the promotion proceedings before the APB.

B. ... [T]o rule that the decision of the Respondent to promote the competing female candidate in preference to the Applicant to the post in question:

(a) [R]esulted from a denial of due process and breach of procedure, in that the decision was based on findings of the APB which were contrary to or unsupported by the record before it and which were not in conformity with the procedure provided for in ST/AI/412 of 5 January 1996, and

(b) [W]as in violation of the Charter, relevant General Assembly resolutions and the Staff Regulations.

C. ...

(a) [T]o order the Respondent to promote the Applicant to the next D-1 post for which he applies and for which he meets all of the requirements, and

(b) [T]o award the Applicant damages in the amount of $40,000 for the pecuniary and moral damages that he has suffered."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2001 and periodically thereafter until 1 June 2001;

Whereas the Respondent filed his Answer on 30 May 2001;

Whereas, on 11 July 2001, the Applicant filed Written Observations amending his pleas as follows:

"In addition to the Pleas set forth in Section II of the Application, the Applicant asserts the following additional Plea, identified as C (c), to be added after Plea C (b):

(c) [T]o order the Respondent to calculate the Applicant's pension as if he had been promoted to the D-1 level as of 7 May 1998."

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a three-month fixed-term appointment as a Legal Officer at the P-3 level with the International Trade Law Branch, Office of Legal Affairs (OLA), Vienna, on 23 June 1981. His fixed-term appointment was extended several times and effective 1 July 1984 he was granted a permanent appointed and was promoted to the P-4 level. On 1 November 1990, the Applicant was reassigned to the General Legal Division (GLD), OLA,

New York. Effective 1 May 1991, the Applicant was promoted to the P-5 level and his functional title was changed to Senior Legal Officer.

On 30 July 1997, the Applicant submitted his application to the D-1 level post of Principal Legal Officer, GLD, OLA. On 23 December 1997, OLA recommended that the Applicant be promoted to the post as he was the superior candidate. According to OLA, another, female, candidate ("the female candidate") from GLD was less qualified than the Applicant. However, on 10 March 1998, the APB decided to recommend the female candidate to the post. Following a further review of the case at the request of the Under-Secretary-General for Management, the APB upheld its original recommendation, on the grounds that the candidates were equally qualified, and in keeping with administrative instruction ST/AI/412, on the achievement of gender equality.

On 29 April 1998, the Secretary-General approved the APB's recommendation.

On 26 June 1998, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 level.

On 3 September 1998, the Applicant lodged an appeal with the JAB. His appeal included a request that the JAB obtain from the APB, and provide him with, all records and documents relating to this promotion exercise.

On 21 September 1999, the Secretary of the JAB requested the APB to provide the Panel with the minutes from the APB meetings regarding the filling of the subject D-1 post. On 6 December 1999, the Panel was provided with "true, accurate and complete copies of the notes taken by the Secretary [of the APB]". These were disclosed to the JAB on the understanding that they should not be communicated to the Applicant.

The JAB adopted its report on 4 April 2000. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
>
> ...
>
> 17. The Panel considered that the Appellant had a legitimate interest in gaining access to the APB meeting records ... On the other hand, the Respondent also had a valid interest in keeping those documents beyond the reach of the parties so as to maintain the APB proceedings as confidential as possible. ...

18. ... [T]he Panel Chairperson decided not to release the APB meeting notes to the Appellant or any one else, as, in her view, the interest of the Respondent in preserving the confidential nature and hence the proper functioning of the APB proceedings far outweighed that of the Appellant in making use of those records to substantiate his allegations and claims.

...

20. ... The Panel felt that the dissemination of those APB documents to the parties ... would compromise the efficiency of the proceedings of the APB and undermine its role as an independent advisory body ...

...

28. It should be emphasized that, rather than an extraneous factor as implied by the Appellant, seniority is one of the criteria for promotion ...

...

Conclusions and Recommendation

32. In light of the foregoing, the Panel unanimously agreed that it was not competent under Staff Rule 111.2(k) to reopen the issue of the relative competence and qualifications of the competing candidates for the D-1 post.

33. The Panel also unanimously agreed that the APB was not required to automatically follow the OLA recommendation ... and that its failure to follow the OLA recommendation constituted no breach of any provision of ST/AI/412.

34. The Panel further unanimously agreed that there existed adequate evidence showing that the Appellant had received fair and full consideration during the promotion exercise and that no adequate evidence had been offered to support the allegations of prejudice and improper motivation.

35. The Panel makes no recommendation in support of the present appeal."

On 13 April 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to take no further action on his appeal.

On 31 August 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The failure of the JAB to obtain the full written record of the promotion proceedings before the APB, and the JAB's consideration of and making of a recommendation without having the full written record, violated the Applicant's right to due process.

2. The failure to provide to the Applicant the full written record of the promotion proceedings before the APB violated the Applicant's due process rights.

3. The decision to promote the competing female candidate resulted from a denial of due process and of breach of procedure and was in violation of the Charter, relevant General Assembly resolutions and the Staff Regulations.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to a promotion to the subject D-1 post.

2. There was no violation of the Applicant's due process rights.

3. The Secretary-General's decision not to promote the Applicant is in accordance with the Charter and the general principles of the Organization regarding the improvement of the status for women in the Secretariat, as mandated by the General Assembly.

The Tribunal, having deliberated from 3 to 26 July 2002, now pronounces the following Judgement:

I. The issue in this case is the Respondent's decision to promote a female candidate, rather than the Applicant, to a D-1 post and the proceedings leading to this decision.

II. The Applicant challenges the recommendations of the JAB and the decision of the Respondent and submits that the Respondent violated the principles set forth in Article 101 (3) of the Charter, the relevant General Assembly resolutions and staff regulation 4.2, all of which provide that in promotion decisions, paramount consideration should be given to "the necessity of securing the highest standards of efficiency, competence and integrity." In this regard the Applicant argues that the achievement of gender equality, as set forth in ST/A1/412 is subject to this paramount consideration. Preference for selection of a female candidate applies only when her qualifications are substantially equal or superior to those of competing male candidates. The

Tribunal in its Judgement No. 671, *Grinblat* (1994), stated that "[Article 101 (3) of the Charter] unequivocally establishes a standard under which less qualified persons are not entitled to preferential treatment based on gender".

Furthermore, the Applicant claims that the JAB based its considerations and recommendations on an incomplete and inadequate record of the APB proceedings, depriving him of a full consideration of his case and consequently violating his rights of due process.

III. The Tribunal notes that the Director, GLD, as well as the Legal Counsel, evaluated the Applicant as the superior candidate and consequently recommended him for the promotion to the D-1 level post. In fact, the record shows that the Director, GLD, indicated that the candidates were not equally qualified and gave compelling reasons as to why the Applicant was the superior candidate in terms of quality of work and overall performance. Notwithstanding the foregoing evaluation, the APB, after conducting an independent review of the information before it, concluded that the female candidate's qualifications met all the requirements for the vacant post and were substantially equal to those of the Applicant.

IV. In its established jurisprudence, the Tribunal has confirmed that appointments and promotions are within the discretionary authority of the Secretary-General. (See Judgement No. 958, *Draz*, (2000) citing Judgement No. 411, *Al-Ali* (1988).) Furthermore, the Tribunal reaffirmed in *Draz* that "qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy".

V. However, these discretionary powers of the Secretary-General are not absolute. They are governed by the relevant provisions of the Charter and by General Assembly resolutions. In this context the Tribunal notes that ST/AI/412 provides that special measures for the achievement of gender equality within the Secretariat must be instituted towards achieving the goal of "50-50 parity between men and women both overall and for positions at the D-1 level and above by the year 2000". It also provides for flexibility in various promotion requirements "in order to increase the number of women considered for promotions", for example flexibility regarding seniority. Moreover, the Tribunal reaffirmed in *Draz* that the implementation of special

measures for the achievement of gender equality, in compliance with General Assembly resolutions, is fully consistent with the exercise of the Secretary-General's discretionary authority, even if such measures are at the expense of other candidates.

The Tribunal in *Grinblat* made reference to General Assembly resolutions 44/185, 45/239 and 46/100, all of which recalled Articles 8 and 101 of the Charter and urged the Secretary-General to strengthen his efforts to increase the number of women, particularly in senior and policy-making posts and concluded as follows:

> "XVII. The Tribunal recognizes that the various resolutions for improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women."
>
> ...
>
> "XIX. Even so, there is room for affirmative action. The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates ..."

The Tribunal finds that these words are still pertinent today, particularly since the goal of 50-50 parity has not yet been reached. The Tribunal therefore finds that the Respondent acted within his discretionary authority in deciding to promote a substantially equally qualified female candidate to the D-1 level post.

VI. As for the Applicant's request to gain access to the APB records, the Tribunal is sympathetic to this legitimate interest in obtaining information on how his candidacy was reviewed, particularly in light of the strong departmental recommendation to promote him and

the contradicting final outcome; at the same time, the Tribunal shares the Respondent's concern, that these documents should be kept beyond the reach of the parties in order to preserve the confidential nature of the APB proceedings and to enable it to function properly and efficiently. Having said this, the Tribunal finds that the JAB had before it all the necessary documents and information, enabling it to reach an informed conclusion.

VII. The fact that the APB did not follow the assessment of the Legal Counsel and the Director, GLD, does not constitute a breach of procedure. The JAB rightly pointed out that "OLA's recommendation remained a recommendation only and was subject to review by the APB, which may accept or reject it, in full or in part". Moreover, the Tribunal notes the Respondent's assertion that, if the APB were to always follow departmental recommendations, this would result in the APB having no role to play in the promotion process.

Thus, the Tribunal finds that the Applicant received full and fair consideration and that no adequate evidence has been offered to support the Applicant's allegations that the contested decision was tainted by procedural irregularities, undue influence or improper motivation.

VIII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary